85-127

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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1985

ROLANDO CARRILLO,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether there was a sufficient showing by the government under *United States v. James*, 590 F.2d 595 (5th Cir. 1979) that an unindicted declarant was a member of the conspiracy, thereby allowing declarant's hearsay testimony to be admitted under Federal Rule of Evidence 801(d)(2)(E).

2. Whether a minor player in the conspiracy should be tried separately from the other members of the conspiracy where highly prejudicial evidence was admitted against the major actor in the conspiracy.

3. Whether the prosecutor's identification of the investigative agent as a member of the Vice-President's Task Force on Crime in Miami injected a highly prejudicial suggestion into the trial that the petitioner was a part of the widely publicized Miami Crime problem.

THE PARTIES TO THE PROCEEDING BELOW

The following is a list of all parties to the proceeding in the United States Court for the Eleventh Circuit, whose judgement is sought to be reviewed herein by this Petitioner:

ROLANDO CARRILLO

ANTONIO PADRON

GERALDO HERNANDEZ

UNITED STATES OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ROLANDO CARRILLO, the petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this matter on May 20, 1985.

OPINION BELOW

The May 20, 1985 opinion of the 11th Circuit Court of Appeals, whose judgement is herein sought to be reviewed, is unreported, and is reprinted in the separate appendix to this Petition, page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered June 21, 1985.

The jurisdiction of this court is invoked pursuant to Title 28, U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, reprinted in Appendix B.

This case also involves Federal Rule of Evidence 801(D)(2)(E), reprinted in Appendix C.

This case also involves Federal Rule of Criminal Procedure 14, reprinted in Appendix D.

STATEMENT OF THE CASE

ROLANDO CARILLO was charged in five counts of a ten count Indictment, returned August 13, 1983, with various violations of the federal firearms laws as well as conspiracy to violate those laws. Several combinations of the co-defendants were charged in all ten counts, and some were charged in counts 1, 2, 3, 5 and 9 with ROLANDO CARILLO.

At the trial, the government offered the testimony of Buhjat Kahan ("Peter") who had received a .38 caliber gun from Raul Rivera ("Rif"). Upon receiving the gun, Peter turned it over to Nick Jacibellas of the New York District Attorney's Office. Later, Peter, who had been paid Fifty Dollars ($50.00) to assist law enforcement authorities, arranged a meeting between Rif and Mike Rappa, an undercover investigator with the Bergen County, New Jersey, Prosecutor's Office, who was posing as a person interested in purchasing guns. Following discussions, Rif sold Rappa a gun for Three Hundred Dollars ($300.00).

Peter testified that Rif told him that the guns were brought from Miami to New York in a black Trans Am and sold from a store on 125th Street in New York City. During the course of conversation between Rif and Peter, Rif did not further identify the source of the guns beyond stating that the source had a girlfriend.

Josephine Capo, the former girlfriend of Geraldo Hernandez, described an operation by which firearms came to New York City from Miami. This testimony included the fact that Mr. Hernandez owned and drove a black Trans Am.

Capo's testimony also described how Rolando Carrillo's limited role in the operation was to drive the third of four shipments of guns from Miami to New York.

In response to questions from the prosecutor, Josephine Capo testified that the Defendant, Hernandez, threatened to hurt her if she talked to the authorities about him. She further testified that Hernandez attempted to grab her son from her. Special Agent Fredricks later characterized that incident as an attempted kidnapping of her son and further testified that it was necessary to "put her up for the night" because of the "difficulties she was having as to staying at the residence where she was currently living".

The Court instructed the jury that the encounter between Hernandez and Capo should only be considered in connection with the charges against Hernandez, and not the other defendants.

Another Government witness, ATF Special Agent Dennis Viera, conducted surveillance in this case. When asked at the trial what his assignment was at the time of that surveillance, he responded that he was assigned to the "Vice-President's Task Force on Crime in Miami".

The jury returned guilty verdicts as to the Defendant on Counts 1, 2, 5, and 9 and as to the co-defendants Antonio Padron and Geraldo Hernandez on all counts of the Indictment.

All Defendants were sentenced by the District Court on May 4, 1984. ROLANDO CARRILLO was

sentenced to three (3) years imprisonment as to each of the counts 1, 2 and 5 to run concurrently and as to Count 9, three (3) years probation to commence upon his discharge from incarceration.

The Court of Appeals for the Eleventh Circuit affirmed the conviction without opinion.

REASONS FOR GRANTING THE WRIT

Due to the grievious errors which occurred during the Petitioner's trial and affirmed by the Court of Appeals, the Petitioner was deprived of a just and fair trial guaranteed him by the Fifth Amendment due process clause of the United States Constitution.

1.

THE TRIAL COURT ERRED IN THE ADMISSION OF HEARSAY STATEMENTS MADE BY AN UNINDICTED DECLARANT WHICH ALLOWED THE JURY TO HEAR EVIDENCE WHICH WAS HIGHLY PREJUDICIAL.

At trial, the Government offered the testimony of Buhjat Kahan ("Peter") who had received a .38 caliber gun from Raul Rivera ("Rif"). Over defense objections, Peter was permitted to testify as to how Rif came to possess the gun. This testimony was comprised mostly of hearsay statements made by Rif to Peter.

Citing Rule 801(a)(2)(E) of the Federal Rules of Evidence, the Government contended that Rif was an unindicted co-conspirator, and therefor his statements were not hearsay.

In allowing Peter's testimony regarding Rif's hearsay statements, the Court observed that the requirements of *United States v. James*, 590 F.2d 575 (5th Cir. 1979), had not been met, and warned the Government, "If you don't tie it up, it means the case will have to be dismissed."

Defense counsel then announced a continuing objection to the testimony of Peter as to statements made by Rif and the Court accepted this objection. As stated in *James*:

> A declaration by one defendant is admissible against other defendants only when there is a sufficient showing, *by independent evidence*, of a conspiracy among one or more defendants and the declarant and if the declarations at issue were in furtherance of the conspiracy. (A)s a preliminary matter, *there must be substantial, independent*, evidence of a conspiracy at least enough to take the question to the jury. (Emphasis supplied)

590 F.29 581. Alternatively, the Court may defer making a determination as to the admissibility of an alleged co-conspirator's statements until the end of the presentation of the Government's case. In this manner, the statement of one alleged co-conspirator may be introduced against another accused co-conspirator during the course of the trial; but such presentation is subject to a determination by the Court as to:

> . . . (w)hether the prosecution has shown by a preponderance of the evidence independent of the statement itself (1) that a conspiracy existed, (2) that the co-conspirator and the defendant against whom the co-conspirator's statement is offered were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy.

United States v. James, supra at 582, referring to Rule 801(d)(2)(E) Federal Rules of Evidence. If the trial judge finds that the prosecution has failed to meet its burden on each of the mentioned conditions, ". . . the judge must decide whether the prejudice arising from the erroneous admission of the conspirator's statement can be cured by a cautionary instruction to disregard the statement or whether a mistrial is required." *United States v. James, supra,* at 583; see also, *United States v. Bell,* 573 F.2d 1040, 1044 (8th Cir 1978); *United States v. Stanchich,* 550 F.2d 1294, 1297-98 (2nd Cir 1977).

The Government failed to show any evidence at all that Rif was a member of a conspiracy that purchased firearms in Florida for transportation to, and distribution in, New York. The Government's evidence, at best, showed that Rif's knowledge was based entirely upon hearsay statements made to him by an unidentified individual who allegedly told him that the firearms sold in the 125th Street store were brought to New York from Florida in a black Trans-Am. In addition, the Government failed to provide any evidence that would tend to show that Rif knew the source of the guns in Florida, the driver of the vehicle, or the identity of any persons associated with the conspiracy.

The Court of Appeals for the Eleventh Circuit has held that ". . . participation in a conspiracy need not be proved by direct evidence. It can be inferred from a 'development and a collocation of circumstances' ". *United States v. Kopituk*, 690 F.2d 1289, 1323 (11th Cir. 1982). *See also United States v. Malalesta*, 590 F.2d 1279, 1281 (5th Cir. 1979) (enbanc), *cert. denied*, 440 U.S. 962, (1979), quoting *Glasser v. United States*, 315 U.S. 60, 80, (1942). The facts in this case do not show Rif to be a member of a conspiracy with either of the two principal defendants, Geraldo Hernandez or Antonio Padrone, or ROLANDO CARRILLO, who the Government admitted played only a minor role.

ROLANDO CARRILLO was unduly prejudiced by the admission into evidence of Peter's testimony about Rif's purported statements. Even if a cautionary instruction had been given pursuant to *United States v. James*, *supra*, the extreme prejudice against the Defendant could not have been cured. If Peter's testimony had been barred, the jury would only have had Ms. Capo's testimony in deciding the guilt of the Defendant. The erroneously admitted testimony of Peter, overshadowed the cross-examination of Ms. Capo, which showed her extreme bias against the principal Defendant, Geraldo Hernandez. On cross-examination, Ms. Capo testified that she had lived with Mr. Hernandez, that he had helped take care of her children from a former marriage by providing them with a home and money and that he provided her with a job for nearly three yea s. Ms. Capo and Mr. Hernandez lived like husband and wife until their relationship terminated in 1983. Ms. Capo testified that the reason she moved out was because she was afraid Mr. Hernandez would beat her.

After Ms. Capo moved out of their joint residence, Mr. Hernandez warned her not to say anything about their gun operation, and threatened her with physical violence and attempted to kidnap her son. Ms. Capo, who was in constant fear of Mr. Hernandez, took her children and stayed with her mother, uncle and friends in an attempt to hide from Mr. Hernandez. The facts surrounding Ms. Capo's testimony clearly indicate a strong bias against the principal defendant, Geraldo Hernandez, and her testimony above, unsupported by the hearsay testimony of Peter, would be highly suspect in linking ROLANDO CARRILLO to the sale and distribution of firearms.

2.

THE ADMISSION OF HIGHLY PREJUDICIAL EVIDENCE CONCERNING KIDNAPPING AND THREATS MADE BY CARRILLO'S CO-DEFENDANT CAUSED CARRILLO TO BE DEPRIVED OF A FAIR TRIAL.

Due to the outrageous nature of the evidence, the jury could not individualize the evidence against each Defendant, and ROLANDO CARRILLO should have been severed from the trial.

The decision to sever a defendant from a joint trial is within the sound discretion of the trial court. *United States v. Sans*, 731 F.2d 1521 (11th Cir. 1984). To show an abuse of discretion by a District Court in refusing to grant a motion for severance, a defendant must demonstrate that the joint trial subjected him to compelling prejudice against which the trial court was unable to afford protection. *United States v. Kopituk*,

690 F.29 1289 (11th Cir. 1982); *United States v. Harper*, 680 F.2d 731 (11th Cir. 1982). In making its determination, the trial court should balance the risk of prejudice to the defendant from evidentiary spillover or transference of guilt against the interest of judicial economy. *United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B), *cert. denied*, 457 U.S. 1136 (1981); *United States v. Zicree*, 605 F.2d 1381 (5th Cir. 1979). The correctness of a trial court's ruling on a motion to sever defendants depends not only on what is literally contained within the four corners of the indictment, but also on evidence adduced at trial. *United States v. Saldibar*, 710 F.2d 699 (11th Cir. 1983). Therefore, even if joinder initially is proper, Federal Rule of Criminal Procedure 14 permits the trial judge to order severance if that joinder later results in prejudice to the defendant. *See United States v. Berkowitz*, 662 F.2d 1127 (5th Cir. 1981) (Court has a continuing duty to monitor the entire trial for prejudice and to order severance if prejudice does arise).

In reviewing the trial court's ruling for abuse of discretion, an appellate court must consider whether the jury could individualize each defendant in his relation to the mass, i.e., whether the jury could avoid cumulating the evidence against all the defendants and make individualized guilt determinations. *United States v. Phillips*, *supra* at 971.

An appellate court must further determine whether the jury could follow the court's cautionary and admonitory instructions and accordingly collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. *Id* at 1017. *See United States v. Marszalkowski*, 669 F.29 655 (11th Cir. 1982).

In the present case, highly prejudicial evidence concerning kidnapping and threats to a witness was admitted, over CARRILLO's objection, against the Defendant, Hernandez. Although the court instructed the jury that the evidence was to be considered against Hernandez alone, the mere fact that an alleged co-conspirator and co-defendant utilized threats of violence and kidnapping against a witness, and the fact that the witness was ultimately taken into protective custody by the Government, was so prejudicial as to outweigh any possible curative instruction.

There is a probability that the Petitioner, CARRILLO, was painted with the same broad brush as Hernandez after the admission of the highly prejudicial evidence of kidnapping and threats. The trial court abused its discretion in admitting that evidence in a joint trial and failing to sever the Petitioner, CARRILLO, from the case.

3.

THE TESTIMONY ELICITED BY THE PROSECUTOR THAT THE INVESTIGATIVE AGENT WAS A MEMBER OF THE VICE PRESIDENT'S TASK FORCE ON CRIME IN MIAMI DEPRIVED CARRILLO OF A FAIR TRIAL BY FOCUSING THE JURY'S ATTENTION ON FEAR AND PREJUDICE AND AWAY FROM THE FACTS OF THE CASE.

A prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to an understanding of the facts and the law. *Phillips*,

supra at 971 (5th Cir. Unit B 1981). See also *Tucker v. Zant*, 724 F.2d 882 (11th Cir. 1984). In the present case, the prosecutor elicited through Special Agent Fredericks that, at the time of the surveillance in question, he was assigned to the Vice-President's Task Force on Crime in Miami.

During recent years it has been well publicized that Miami has suffered from an unprecedented crime wave. Because of Miami's unique geographic location it has become the center of narcotics importation for the United States. Due to South Florida's unique crime problems it has become the focus of the first Vice-Presidential task force on crime. Agents from various departments from across the country have been assigned to Miami to help ferret out criminal activity. By injecting the Vice-President's Task Force on Crime in Miami into this case, the jury's attention was focused away from the facts of this case and onto the severe and sometimes violent criminal problem in Miami. *See United States v. Love*, 534 F.2d 87 (6th Cir. 1976) in which the court reversed a conviction when the prosecutor intentionally and for no proper purpose injected into the trial the spector of organized crime and the Mafia.

In addition, by lending the Vice-Presidential's title to the investigative agent in this case, his credibility and the importance of his task was impermissibly bolstered. As such, the jury's attention was again directed to factors of passion, prejudice and fear of crime rather than to the facts of this individual case, thereby depriving CARRILLO of a fair trial.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted. In light of the insufficiency of evidence against the Petitioner, and the due process violations which took place, Petitioner's conviction should be reversed and a new trial granted in the interest of fairness and justice.

Respectfully submitted,

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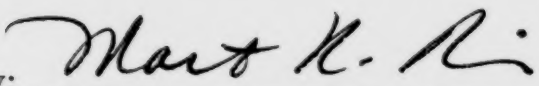
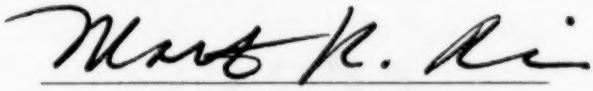
By: 

MARTIN R. RASKIN

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this petition was mailed to the Solicitor General Department of Justice, Washington, D.C. 20530.



MARTIN R. RASKIN

Appendix

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 84-5361

Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROLANDO CARRILLO,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(May 20, 1985)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

APPENDIX B

U.S.C. CONSTITUTION AMENDMENT FIVE

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

FEDERAL RULE OF EVIDENCE 801

801. Definitions

The following definitions apply under this article:

(a) Statement

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant

A "declarant" is a person who makes a statement.

(c) Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay

A statement is not hearsay if —

(1) Prior statement by witness

The declarant testifies at the trial or hearing and is subject to cross-examination concerning

the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent

The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

APPENDIX D

FEDERAL RULE OF CRIMINAL PROCEDURE 14

14. Relief from Prejudicial Joinder

If it appears that a Defendant or the government is prejudiced by a joinder of offenses or of Defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant a severance of Defendants or provide whatever other relief justice requires. In ruling on a motion by a Defendant for severance the Court may order the attorney for the government to deliver to the Court for inspection in camera any statements or confessions made by the Defendants which the government intends to introduce in evidence at the trial.

APPENDIX E

TITLE 18, UNITED STATES CODE, §371.

If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.